

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 01, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALLIANCE FOR THE WILD
ROCKIES,

Plaintiff,

v.

UNITED STATES FOREST
SERVICE, VICKI CHRISTIANSEN,
Chief of the Forest Service, KRISTIN
BAIL, Forest Supervisor for the
Okanogan-Wenatchee National Forest
Service, GLENN CASAMASSA,
Regional Forester for Region 6 for the
U.S. Forest Service, and UNITED
STATES FISH AND WILDLIFE
SERVICE,

Defendants.

No. 2:19-cv-00350-SMJ

**ORDER GRANTING
GOVERNMENT'S CROSS-
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

The Mission Restoration Project ("Mission Project" or "Project") encompasses about 50,200 acres of federal lands in the Methow Valley near Twisp, Washington. The Project primarily involves the Libby Creek and Buttermilk Creek drainage basins but also comprises a small portion of the Twisp River watershed. Over the past couple centuries, historical forest management practices like fire suppression, road building, and livestock grazing have led to a deterioration in

ORDER GRANTING GOVERNMENT'S CROSS-MOTION FOR SUMMARY
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JUDGMENT – 1

1 hydrologic function, aquatic habit, wildlife habitat, soil productivity, and vegetation
2 composition, among other things. When combined with the continuing impacts of
3 climate change, these past management practices have created hazardous forest
4 conditions—from an increased risk for extreme wildfires to reduced instream flows.
5 The Mission Project aims to restore the Libby and Buttermilk Creek landscapes to
6 be more resilient to wildfire and climate change.

7 Plaintiff Alliance for the Wild Rockies (“Alliance”) moves for summary
8 judgment, challenging the Project on three grounds. First, it claims the Project is
9 inconsistent with the Okanogan National Forest Land and Resource Management
10 Plan, which violates the National Forest Management Act, 16 U.S.C. § 1600, *et seq.*
11 It next argues the United States Forest Service’s failure to prepare an environmental
12 impact statement violates the National Environmental Policy Act, 42 U.S.C. § 4321,
13 *et seq.* Finally, it insists that the Forest Plan and the Mission Project violate the
14 Endangered Species Act, 16 U.S.C. § 1531, *et seq.* Defendants United States Forest
15 Service, Vicki Christiansen, Kristin Bail, and Glenn Casamassa (“Forest Service”),
16 as well as United States Fish and Wildlife Service (“FWS”) (collectively,
17 “Defendants”) disagree and cross-move for summary judgment.

18 For the reasons discussed below, this Court grants Defendants’ cross-motion
19 for summary judgment and denies Alliance’s motion for summary judgment.

20 //

BACKGROUND

The National Forest Management Act of 1976 (“NMFA”) requires the Secretary of Agriculture (“Secretary”) “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System” (“NFS”). 16 U.S.C. § 1604. The Secretary has promulgated several regulations which set out the planning requirements for developing, amending, and revising land management plans for NFS units. *See generally* 36 C.F.R. §§ 219.1–219.19.

In 1989, the Forest Service issued the Okanogan National Forest Land and Resource Management Plan and Final Environmental Impact Statement (“Forest Plan”). AR 00003.

Plans . . . guide management of NFS lands so that they are ecologically sustainable and contribute to social and economic sustainability; consist of ecosystems and watersheds with ecological integrity and diverse plant and animal communities; and have the capacity to provide people and communities with ecosystem services and multiple uses that provide a range of social, economic, and ecological benefits for the present and into the future.

36 C.F.R. § 219.1(c). Still, “[a] plan may be amended at any time.” 36 C.F.R. § 219.13(a). And “[p]lan amendments may be broad or narrow, depending on the need for change, and should be used to keep plans current and help units adapt to new information or changing conditions.” *Id.*

In 2012, the Forest Service issued the Okanogan-Wenatchee National Forest Restoration Strategy (“Restoration Strategy”), a rigorous strategy for restoring the

1 sustainability and resiliency of forested ecosystems on the Okanogan-Wenatchee
2 National Forest (“OWNF”). AR 16786. Many peer-reviewed scientific studies have
3 shown that the OWNF is at risk for abnormally large and severe wildfires and insect
4 outbreaks. U.S. Forest Service, *The Okanogan-Wenatchee National Forest*
5 *Restoration Strategy: Adaptive Ecosystem Management to Restore Landscape*
6 *Resiliency* (2012), [https://www.fs.usda.gov/Internet/FSE_DOCUMENTS](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5340103.pdf)
7 [/stelprdb5340103.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5340103.pdf). The Restoration Strategy thus developed a framework for
8 integrated landscape evaluation and project development to help facilitate
9 restoration of at-risk federal lands. *Id.*

10 Several interested stakeholders subsequently identified the Mission Project
11 as an at-risk area requiring restoration within the OWNF. In particular, a diverse
12 group of local stakeholders called the North Central Washington Forest Health
13 Collaborative (“Forest Collaborative”) partnered with the Forest Service during its
14 early evaluation and project development phase. *See* AR 12325. The Forest
15 Collaborative developed two documents in the National Environmental Policy Act
16 (“NEPA”) pre-scoping phase, which the Forest Service used to develop the
17 proposed action: (1) the *Mission Landscape Prescription and Treatment*
18 *Recommendations* and (2) the *Mission Aquatics Assessment Report*. U.S. Forest
19 Service, *Mission Restoration Project Pre-Scoping*, (Apr. 18, 2016),
20 <https://www.fs.usda.gov/>

1 project/?project=49201. The first report provided direction and targets for
2 addressing deteriorating conditions and restoring more resilient landscapes in the
3 Libby and Buttermilk watersheds; the second report provided a compilation of
4 existing aquatics data and information for those watersheds. *See id.*

5 NEPA requires federal agencies to incorporate environmental considerations
6 into their planning and decision-making through a systematic interdisciplinary
7 approach. 42 U.S.C. § 4332. All federal agencies must prepare detailed statements
8 assessing environmental impacts and alternatives to major federal actions
9 significantly affecting the environment. *Id.* The President’s Council on
10 Environmental Quality (“CEQ”), which oversees NEPA, calls these statements
11 Environmental Impact Statements (“EIS”) and Environmental Assessments (“EA”).
12 *E.g.*, 40 C.F.R. § 1501.3. CEQ has promulgated many regulations implementing
13 NEPA’s procedural provisions. *See generally* 40 C.F.R. §§ 1500–1508 (2018).¹

14 In the spring of 2016, the Forest Service progressed to NEPA’s scoping
15 phase, proposing aquatic, soil, and vegetation restoration activities in the Mission
16

17 ¹ Throughout this Order, this Court applies the NEPA regulations in effect at the
18 time of final agency action in this case—when the Forest Service signed and
19 published its Final Decision Notice and Finding of No Significant Impact on July
20 20, 2018. *See* AR 16786–16810. This Court recognizes that CEQ revised and
replaced these regulations effective September 14, 2020. 40 C.F.R. §§ 1500–1506
(2020); Update to the Regulations Implementing the Procedural Provisions of the
National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,371 (July 16, 2020).

1 Project area. AR 08560–08567. The Forest Service issued the Mission Project
2 scoping letter, inviting interested citizens and stakeholders to participate by
3 providing comments. *Id.* It also conducted government-to-government
4 consultations with the Confederated Tribes of the Colville Reservation and the
5 Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”). AR
6 16794. All said, it received and responded to over 900 scoping comments while
7 developing its preliminary EA. AR 15785–16674; AR 16675–77.

8 The Forest Service made its preliminary EA for the Mission Project available
9 for review in January 2017. AR 12447–869. That document proposed an
10 amendment to the Forest Plan yet failed to assess how the amendment related to
11 NFS land management planning regulations. AR 14745 (citing 36 C.F.R. 219.8–
12 219.11). The Forest Service thus found the preliminary EA inadequate because the
13 analyses for the Forest Plan amendments disregarded specific land management
14 planning regulations. *Id.* It published a revised preliminary EA in June 2017, which
15 provided the required regulatory analysis, but made no other substantive changes to
16 the Mission Project. *Id.*; *see also* AR 13369–814.

17 The revised preliminary EA addressed the purpose and need for the Mission
18 Project, alternatives considered but eliminated from detailed study, alternatives
19 developed and a comparison of those alternatives, Forest Plan amendments, design
20 criteria, mitigation measures, and monitoring. AR 13369–814. It also detailed

1 existing Project area conditions and any environmental consequences to water
2 resources, soils, vegetation, fire and fuels, wildlife, transportation, botany, range,
3 invasive species, recreation and scenic resources, air quality, economics, and other
4 required disclosures. *Id.* The revised preliminary EA further listed agencies and
5 persons consulted, including tribes, local governments, and individuals. *Id.* The
6 Forest Service invited public comment and objections on the revised preliminary
7 EA before issuing its final EA. *Id.*

8 Apart from its obligations under NFMA and NEPA, the Endangered Species
9 Act (“ESA”) requires the Forest Service (and other federal action agencies) to
10 ensure that the actions it authorizes, funds, or carries out do not jeopardize the
11 existence of any species listed under the ESA or destroy or adversely modify
12 designated critical habitat of any listed species. *See* 16 U.S.C. § 1536(a)(2). To that
13 end, Section 7 of the ESA obliged the Forest Service to consult with the National
14 Oceanic and Atmosphere Administration’s (“NOAA”) National Marine Fisheries
15 Service (“Fisheries”) for marine species and FWS for terrestrial and freshwater
16 species. *See id.*; *see also* § 1536(c)(1) (An action agency must inquire whether any
17 threatened or endangered species “may be present” in the area of the proposed
18 action). The Forest Service thus prepared a Biological Assessment of several
19 species and their associated critical habitat, including upper Columbia River
20 chinook salmon and steelhead, bull trout, northern spotted owl, Canada lynx, gray

1 wolf, wolverine, and grizzly bear. AR 15237–525. It then initiated informal
2 consultation with FWS and NOAA Fisheries. AR 15528–29; AR 15530–31.
3 Relevant here, it determined the Project “may affect” grizzly bear and requested
4 FWS’s concurrence with its “may affect, but not likely to adversely affect”
5 determination. *See id.*

6 The Forest Service issued the Mission Project’s final EA in March 2018. AR
7 14737. The final EA details the Forest Service’s proposal to authorize landscape
8 restoration, wildfire hazard reduction, and transportation system management
9 activities in the OWNF Project area. AR 14745. The Forest Service intended the
10 final EA to evaluate the Project area and prescribe and implement various
11 treatments that rely on the principles of landscape and stand-level restoration
12 ecology, wildfire hazard reduction, and transportation system management while
13 complying with the amended Forest Plan and Restoration Strategy. AR 14746. The
14 final EA provided a No Action Alternative and two Action Alternatives. AR 14765–
15 68.

16 The Forest Service chose Action Alternative 2, as described in the final EA.
17 AR 14713–36; *see also* AR 14737–15232. That alternative comprises various
18 treatments designed to restore the Mission Project area, including both commercial
19 and precommercial thinning (i.e., logging), prescribed fire, soil restoration, riparian
20 habitat improvement and streambank stabilization, road maintenance and

1 decommissioning, culvert replacements, beaver habitat enhancement, and rock
2 armoring, among other things. *Id.*

3 The Forest Service next issued a Draft Decision Notice and Finding of No
4 Significant Impact (“FONSI”), determining that Action Alternative 2 will have no
5 significant impact on the quality of the human environment considering the context
6 and intensity of impacts under 40 C.F.R. 1508.27. AR 14713–36. It thus concluded
7 it need not prepare an EIS. AR 14729. By letter, the Forest Service provided a legal
8 notice about the opportunity to object to the final EA and Draft Decision Notice and
9 FONSI.

10 Meanwhile, FWS issued a letter concurring that the Project “may affect” but
11 is “not likely to adversely affect” any endangered or threatened species in the
12 Project area. AR 15600–13. NOAA Fisheries also issued a letter concurring with
13 the Forest Services’ determination that the Project “may affect” but is “not likely to
14 adversely affect” chinook salmon, steelhead, or their critical habitat. AR 15539–45.
15 Germane to this case, FWS determined that the “[t]he likelihood of direct
16 disturbance to grizzly bears is discountable due to their rareness, wide-ranging
17 habitat use, and the tendency of this species to avoid areas with human activity.”
18 AR 15610. Moreover, the “potential for temporary displacement and minor habitat
19 alteration in the Project area is likely to be insignificant to the survival, reproduction
20 or distribution of the grizzly bear.” AR 15610. FWS thus concurred with the Forest

1 Service’s determination that the Project “may affect” but is “not likely to adversely
2 affect” grizzly bears. AR 15613. FWS noted that the “Project should be reanalyzed
3 if new information reveals effects of the action that may affect listed or proposed
4 species or designated or proposed critical habitat in a manner or to an extent not
5 considered in this consultation.” AR 15613.

6 After the objection period closed, the Forest Service issued its Final Decision
7 Notice (“DN”) and FONSI. AR 16786. The DN/FONSI details the Forest Service’s
8 decision and rationale, including selecting a slightly modified version of Action
9 Alternative 2. *Id.*

10 Alliance sued. ECF Nos. 1, 8. The First Amended Complaint alleges that the
11 Project will have significant adverse impacts on water resources, fish, vegetation,
12 soils, and wildlife. ECF No. 8. It also alleges that the final EA fails to adequately
13 analyze cumulative environmental impacts and relies on delayed and uncertain
14 mitigation measures. *Id.* Alliance claims that Defendants violated NFMA and the
15 Administrative Procedure Act (“APA”) by flouting the Forest Plan. *Id.* It contends
16 that Defendants violated NEPA and the APA by failing to prepare an EIS and
17 adequately analyze environmental impacts. *Id.* And it finally asserts Defendants
18 violated the ESA and the APA by failing to analyze Project impacts on Columbia
19 river bull trout and failing to reinitiate formal consultation on the Forest Plan’s
20 impacts on grizzly bears. *Id.* Alliance seeks declaratory and injunctive relief, as well

1 as an award of costs and attorney fees. *Id.*

2 Alliance moved for summary judgment. ECF No. 19. Defendants responded
3 and cross-moved for summary judgment. ECF No. 20. Alliance responded to
4 Defendants' cross-motion, ECF No. 37, and Defendants replied, ECF No. 38.

5 The Yakama Nation and several conservation groups filed amicus briefs
6 supporting the Mission Project. ECF Nos. 22, 23, 24 & 27. In these briefs, the
7 Yakama Nation, the Forest Collaborative, Conservation Northwest, Methow Valley
8 Citizens Council, the Wilderness Society, and Chelan County emphasize the
9 thorough level of scientific and environmental review; amici also stress the
10 substantial forest and watershed restoration actions as their main reasons for
11 supporting the Mission Project. *See generally id.*

12 On November 10, 2020, this Court conducted a hearing on the parties' cross-
13 motions for summary judgment. At the close of the hearing, the Court took the
14 parties' motions under advisement.

15 STANDARD OF REVIEW

16 Courts must "grant summary judgment if the movant shows that there is no
17 genuine dispute as to any material fact and the movant is entitled to judgment as a
18 matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it could affect the suit's
19 outcome under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
20 248 (1986). An issue is "genuine" if a reasonable jury could find for the nonmoving

1 party based on the undisputed evidence. *Id.* The moving party bears the “burden of
2 establishing the nonexistence of a ‘genuine issue.’” *Celotex Corp. v. Catrett*, 477
3 U.S. 317, 330 (1986). “This burden has two distinct components: an initial burden
4 of production, which shifts to the nonmoving party if satisfied by the moving party;
5 and an ultimate burden of persuasion, which always remains on the moving party.”
6 *Id.* Still, when a case involves reviewing a final agency determination under the
7 APA, courts generally need not perform any fact-finding. *Nw. Motorcycle Ass’n v.*
8 *United States Dep’t of Agric.*, 18 F.3d 1468, 1471–72 (9th Cir. 1994). As this Court
9 must confine the scope of its review to the administrative record, it finds this case
10 ripe for resolution by summary judgment.

11 REVIEW UNDER THE APA

12 This Court reviews the Forest Service’s compliance with NFMA, NEPA, and
13 the ESA under the APA. *All. for the Wild Rockies v. Bradford*, 856 F.3d 1238, 1242
14 (9th Cir. 2017); *see also* 5 U.S.C. §§ 701, 704. This Court will set aside (i.e., vacate)
15 a final agency action if it is “arbitrary, capricious, an abuse of discretion, or
16 otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also Oregon Nat.*
17 *Desert Ass’n v. U.S. Forest Serv.*, 957 F.3d 1024, 1032 (9th Cir. 2020); *Sierra Club*
18 *v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (reiterating “remand, along
19 with vacatur, is the presumptively appropriate remedy for a violation of the APA.”).

20 “Review under the arbitrary and capricious standard is narrow, and [the

1 court] not substitute [its] judgment for that of the agency.” *Oregon Nat. Desert*, 957
2 F.3d at 1032 (9th Cir. 2020) (alteration added) (citation and quotation marks
3 omitted). Courts will find

4 an agency action as arbitrary and capricious ‘if the agency [1] has relied
5 on factors which Congress has not intended it to consider, [2] entirely
6 failed to consider an important aspect of the problem, [3] offered an
7 explanation for its decision that runs counter to the evidence before the
agency, or [4] [if the agency’s decision] is so implausible that it could
not be ascribed to a difference in view or the product of agency
expertise.

8 *Id.* at 1033 (numbering added) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v.*
9 *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Still, “[a]n agency decision
10 will be upheld as long as there is a rational connection between the facts found and
11 the conclusions made.” *Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1132 (9th
12 Cir. 2011).

13 DISCUSSION

14 A. National Forest Management Act

15 To begin with, Alliance claims this Court should vacate the Mission Project,
16 arguing it is inconsistent with Forest Plan Standards and Guidelines on deer habitat,
17 snowplowing, and soil compaction. ECF No. 19 at 19–27. This Court disagrees.

18 1. Legal Framework

19 NFMA establishes a three-tier system which governs forest management
20 actions. *See Citizens for Better Forestry v. United States Dep’t of Agric.*, 341 F.3d

1 961, 965 (9th Cir. 2003) (citing 16 U.S.C. §§ 1601–1687). At the national level, the
2 Secretary of Agriculture promulgates regulations, which govern regional and local
3 forest management plans and require compliance with NEPA. *Id.* (citing 16 U.S.C.
4 § 1604(g)). At the regional level, the Forest Service develops “land and resource
5 management plans” (or forest plans), which govern the management of forest
6 regions. *Id.* at 966. Finally, at the “site-specific” level, the Forest Service designs
7 and implements site-specific actions, which must be consistent with both the
8 national regulations and the regional forest plan. *Id.*; 16 U.S.C. § 1604(i) (“Resource
9 plans and permits, contracts, and other instruments for the use and occupancy of
10 National Forest System lands shall be consistent with the land management plans.”).

11 This Court will defer to the Forest Service’s interpretation of its Forest Plan
12 when it is “susceptible to more than one meaning unless the [Forest Service’s]
13 interpretation is plainly erroneous or inconsistent with the [Forest Plan].” *See*
14 *Native Ecosystems Council v. Marten*, 883 F.3d 783, 793 (9th Cir. 2018) (quoting
15 *Siskiyou Reg’l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 555, 555 n.9 (9th
16 Cir. 2009) (holding courts must apply *Auer* deference to the Forest Service’s
17 interpretation of its land and resource management plans).

18 **2. Deer Habitat**

19 The Forest Plan divides the OWNF into Management Areas (“MAs”), each
20 with different management goals, resource potential, and limitations. AR 01670.

1 The Forest Plan also provides prescriptions for each MA, composed of a goal
2 statement, description, desired future condition, activities, and Standards and
3 Guidelines. *Id.*

4 Prescription 26 corresponds to MA 26, which has a goal of managing “deer
5 winter range and fawning habitats to provide conditions which can sustain optimal
6 numbers of deer indefinitely, without degrading habitat characteristics such as
7 forage, cover, and soil.” AR 01687. The Forest Service’s desired future condition
8 for MA 26 states, in part:

9 Deer winter ranges will be managed to provide optimum habitat
10 conditions for deer by maintaining well distributed winter thermal and
11 snow/intercept thermal cover and foraging areas. Wood product outputs
12 will be provided at a reduced level. Winter recreation activities will be
13 encouraged outside of deer winter range. Access to these areas will be
14 provided on designated through routes to reduce disturbance to
15 wintering deer. Motorized access will be restricted to maintain wildlife
16 habitat effectiveness at higher levels.

17 *Id.* The Standards and Guidelines (“Standards”) governing “Timber Planning” in
18 MA 26 provide: “Scheduled and non-scheduled timber harvests shall be designed
19 to perpetuate deer habitat and to address current habitat needs.” AR 01688. The
20 Standards governing “Sale Preparation” provide:

Operating season for logging and post sale operations shall be restricted
when necessary to protect roads, soil, water, deer winter range, and
fawning areas. To protect deer during winter, operations shall be
prohibited December through March except east of the Okanogan
River. Logging and post sale operations shall be limited to protect

1 fawning during June.

2 AR 01689. As for “Roads,” the Standards provide: “Winter haul may be permitted
3 provided the goals of the management area are met.” *Id.*

4 Alliance argues the Mission Project contravenes these Standards because the
5 EA provides that “commercial thinning would be required under winter conditions
6 in some areas to prevent further soil disturbance. Winter soil conditions allow for
7 protection of detrimentally impacted soils from past management while allowing
8 the area to be thinned by mechanized harvesters to achieve project goals.” ECF No.
9 19 at 23 (quoting AR 14840). Alliance also challenges the DN/FONSI, which notes:

10 Proposed commercial thinning and slash treatments is planned to be
11 completed in two Stewardship contracts. The first contract of
12 commercial thinning treatments with associated fuels treatments will
13 remove trees from the Libby Creek drainage, about 6 MMBF. Much
14 of this contract will likely be winter harvested. The second contract
will remove trees from the Buttermilk Creek drainage, about 2 MMBF.
Most of the units in this second contract could be harvested in either
summer or winter.

15 AR 16788. Alliance contends that because the Mission Project proposes
16 commercial and noncommercial thinning west of the Okanogan River during the
17 winter, and because it relies explicitly on winter logging to protect soils, the Project
18 violates the Standards discussed above. ECF No. 19 at 24. This Court finds these
19 arguments unpersuasive.

20 First, the final EA details the Standards governing MA 26. AR 15199–200.

1 It also notes MA 26 comprises only 2 percent of the total Project area. AR 14751.
2 Even so, to meet the purpose and needs identified in the final EA, the Forest Service
3 recognized that commercial tree thinning would reduce deer winter range cover
4 below Standard MA26-6A, thus requiring a Project-specific amendment. AR
5 14917. The regulations promulgated by the Secretary of Agriculture provide that
6 “[a] plan may be amended at any time.” 36 C.F.R. § 219.13(a). The DN/FONSI
7 emphasizes that the final EA is consistent with the Forest Plan except where
8 amended for deer winter range by its decision. AR 16789; AR 16796–801.

9 The Standards provide logging, and post-sale operations, must be limited
10 only “*when necessary* to protect . . . deer winter range.” AR 01689 (emphasis
11 added). Yet the Standards also allow winter haul when “the goals of the
12 management area are met.” AR 01689. The Mission Project Wildlife Resources
13 Report² discusses the impacts on winter range for mule deer in detail, including MA
14 26, and concludes “that the goals of the management area would be met despite
15 winter operations in deer winter range.” *See* AR 14485–87. It also underscores that
16 “[t]he project would improve conditions for mule deer in the project area, because
17 it will increase forage and reduce open road density, despite minor disturbance on
18

19 ² The Mission Restoration Project Wildlife Resources Report by A. Glidden (2017)
20 (Amended by Rohrer, 2018) is incorporated by reference in the final EA. *See* AR
14921; AR 14458–549.

1 winter range.” AR 14521. The final EA likewise provides a detailed consistency
2 statement addressing the impacts on deer winter range. AR 14970–75. It stresses
3 that “[f]uels treatments would provide for the retention and/or enhancement of key
4 wildlife habitat wherever practicable by increasing forage available for deer and by
5 reducing the risk of widespread loss of habitat from uncharacteristic wildfire
6 behavior.” AR 14917.

7 While the Standards governing “Sale Preparation” “prohibit[] [logging in
8 MA 26] December through March except east of the Okanogan River,” AR 01689,
9 neither the final EA nor DN/FONSI specifically state that the Forest Service plans
10 to conduct “Sale Preparation” activities or to grant contracts for commercial
11 thinning on MA 26 during that period. Alliance has presented no disputed material
12 fact like a permit, contract, or other instrument showing that the Forest Service
13 explicitly plans logging and post-sale operations on MA 26 during the prohibited
14 period. *See* 16 U.S.C. § 1604(i). As a result, Alliance has shown no inconsistency
15 with the Forest Plan Standards outlined above. *See id.* Nor has it shown precluding
16 the Project is “*necessary to protect . . . deer winter range.*” *See* AR 01689 (emphasis
17 added).

18 In sum, Alliance has not shown the Forest Service acted arbitrarily and
19 capriciously under the APA. *See* 5 U.S.C. § 706(2)(A). On the contrary, the Forest
20 Service provided a thorough analysis and emphasizes the Project will improve deer

1 habitat over the long term. This Court’s “[r]eview under the arbitrary and capricious
2 standard is narrow,” and it will not substitute its “judgment for that of the agency.”
3 *See Oregon Nat. Desert*, 957 F.3d at 1032. This Court finds the Forest Service’s
4 analysis of MA 26, including impacts on the deer winter range, consistent with the
5 Forest Plan. *See* 16 U.S.C. § 1604(i).

6 **3. Snowplowing**

7 Alliance next claims the Project is inconsistent with Standards that bar
8 snowplowing Forest Road 43. ECF No. 19 at 24. But Alliance failed to raise this
9 allegation in its First Amended Complaint, and it may not raise such a claim for the
10 first time in its summary judgment motion.

11 The Forest Service first argues that parties challenging administrative
12 decisions must structure their participation to alert the agency to the parties’
13 position and contentions to allow the agency to give the issue meaningful
14 consideration. ECF No. 20 at 22 (citing *Dep’t of Transp. v. Pub. Citizen*, 541 U.S.
15 752, 764 (2004) and *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1208 (9th Cir.
16 2004)). It points out that Alliance did not object to the snowplowing standards
17 during the NEPA comment period. *See id.* Even so, the Forest Service’s reliance on
18 *Public Citizen* and *City of Sausalito* appears misplaced. Those cases address
19 challenges under NEPA, and it is unclear whether that reasoning applies outside the

1 NEPA context.³ But this Court need not decide whether this reasoning extends to
2 NFMA challenges under 16 U.S.C. § 1604(i) because Alliance’s argument is not
3 properly before the Court.

4 Alliance clearly challenges the Mission Project’s consistency with the Forest
5 Plan under NFMA, and it failed to raise this issue in its First Amended Complaint.
6 See ECF No. 8. Under Federal Rule of Civil Procedure 8(a)(2), a complaint must
7 contain a “short and plain statement of the claim showing that the pleader is entitled
8 to relief.” The complaint need not provide “detailed factual allegations,” but it
9 “requires more than labels and conclusions, and a formulaic recitation of the
10 elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
11 544, 555 (2007). Plaintiffs must plead enough facts “to ‘state a claim to relief that
12 is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
13 *Twombly*, 550 U.S. at 570).

14 Ninth Circuit “precedents make clear that where, as here, the complaint does
15 not include the necessary factual allegations to state a claim, raising such claim in
16

17 ³ *Public Citizen* and *City of Sausalito* in turn rely on cases that address challenges
18 in the NEPA context. See, e.g., *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th
19 Cir. 1986) (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def.*
20 *Council, Inc.*, 435 U.S. 519, 553 (1978) (“[I]t is true that NEPA places upon an
agency the obligation to consider every significant aspect of the environmental
impact of a proposed action, it is still incumbent upon intervenors who wish to
participate to structure their participation so that it is meaningful, so that it alerts the
agency to the intervenors’ position and contentions.”).

1 a summary judgment motion is insufficient to present the claim to the district court.”
2 *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008); *see also*
3 *Pac. Coast Fed’n of Fishermen’s Associations v. Glaser*, 945 F.3d 1076, 1086–87
4 (9th Cir. 2019); *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968–69 (9th
5 Cir. 2006). Alliance never mentions its snowplowing claims in its First Amended
6 Complaint. *See* ECF No. 8.

7 For these reasons, Alliance’s snowplowing claims are not properly before
8 this Court on summary judgment.

9 **4. Soil Compaction**

10 Alliance finally claims the Forest Service failed to establish compliance with
11 the Forest Plan’s soil compaction limit in violation of NFMA. ECF No. 19 at 25–
12 27. Yet this final claim under NFMA also fails.

13 The Forest Service generally defines “detrimental soil disturbance” (“DSD”) as a
14 combination of compaction, puddling, rutting, burning, erosion, and
15 displacement. *See generally* AR 14421–24. Under the “Management” heading,
16 Standard 13-10 governing “Soil and Water” provides: “Ground yarding systems
17 shall be restricted to meet Regional guidelines for soil compaction, displacement,
18 and puddling. *No more than 15 percent of an area* shall be in a puddled, displaced,
19 or compacted condition following completion of management activities.” AR
20 01626 (emphasis added). The Soil Resource Report (“Soil Report”) prepared for

1 the Mission Project notes, “[s]oil standards are built into Forest Plans.” AR 14421.
2 The Forest Service Manual establishes the framework for sustaining soil quality and
3 hydrologic function; the Region 6 Supplement designs and implements
4 management practices, which maintain or improve soil and water quality. *Id.*

5 Alliance argues the Forest Service improperly relied on an “average” DSD
6 for the entire Project area rather than assessing each treatment unit’s soil conditions.
7 ECF No. 19 at 26 (citing AR 14838). But Alliance misreads the Soil Report and
8 final EA.

9 First, “[s]oils and landforms vary across the project area.” AR 14426. In the
10 spring of 2015 and 2016, a professional soil scientist assessed each proposed
11 treatment unit. AR 14423. The soil scientist field reviewed these treatment units
12 using walkthrough surveys. *Id.* The surveys identified past management activities
13 that have produced persistent DSD. *Id.* These past activities include, for example,
14 timber harvesting, grazing, road construction, recreation, shake mills, and fires. AR
15 14427. Current DSD levels in the analysis area stem mostly from these past
16 activities and form the foundation of soil conditions today. *Id.*

17 The final Soil Report section covering methodology highlights, “[t]he
18 analysis area for soils encompasses all land within an individual treatment unit.”
19 AR 14830. It measures soil disturbance, including compaction, rutting, and
20 puddling, as percentages for each unit. AR 14831. Critically, it notes, “DSD was

1 identified in 40 of the proposed commercial treatment units. Existing DSD is within
2 soil quality standards for 26 units and 14 units are at or very near soil management
3 guidelines. DSD was not identified in the remaining 31 treatment units.” AR 14426.
4 The Forest Service calculated existing soil conditions in the 74 treatment units
5 within the project area using the Forest Soil Disturbance Monitoring Protocol and
6 Region 6 soil monitoring protocols. AR 14428–29.

7 The Region 6 Supplement to Forest Service Manual 2500 outlines added
8 policy to maintain or improve soil and water quality. It provides “[i]n areas where
9 less than 20 percent detrimental soil conditions exist from prior activities, the
10 cumulative detrimental effect of the current activity following project
11 implementation and restoration must not exceed 20 percent.” AR 14421 “In areas
12 where more than 20 percent detrimental soil conditions exist from prior activities,
13 the cumulative detrimental effects from project implementation and restoration
14 must, at a minimum, not exceed the conditions prior to the planned activity and
15 should move toward a net improvement in soil quality.” AR 14421. The Soil Report
16 concludes,

17 Alternative 2 will produce additional soil disturbance that overlaps in
18 time and space with the existing soil conditions. This disturbance will
19 be minor to moderate immediately after project implementation, but
20 soil BMPs will facilitate these impacts are short-term. Activities such
as sub-soiling will have an immediate minor affect to the treated areas,
but there is a long-term benefit of de-compacting these soils and
reestablishing proper soil functioning such as water infiltration, soil

1 biological function, and native plant communities (Archuleta et al
2 2006). Future wildfires, OHV use, firewood gathering, and road
3 maintenance activities are the most likely on-going and reasonably
4 foreseeable actions that would cumulatively affect soil resources in
treatment units. Mitigations and rehabilitation will insure Alternative 2
meets the Okanogan-Wenatchee Forest Plan and Region 6 standards
and guidelines.

5 AR 14449. The Report finally emphasizes, “No units will exceed the Region 6
6 standards and guidelines for soil quality in Alternative 2.” AR 14450.

7 The final EA reflects these findings. AR 14833–34. It details each
8 alternative’s environmental consequences, AR 14836–44, and provides a detailed
9 consistency statement of compliance with the Forest Plan and other relevant laws,
10 regulations, policies, and plans. AR 14844–45. The Forest Service determined that
11 “[t]he proposed actions, design criteria, and mitigation measures are in compliance
12 with the [Forest Plan] standards and guidelines 13-9 and 13-10 by reducing the
13 amount of soil displacement, compaction, and puddling.” AR 14844.

14 Alliance argues because the Forest Service calculated the average existing
15 DSD in each treatment unit at four to seven percent, and under either action
16 alternative the average DSD in each treatment unit will increase to seven to ten
17 percent, “it’s likely that there will be timber units that exceed the 15% limit
18 following the completion of management activities within the Mission Project.”
19 ECF No. 19 at 26. Without evidence, Alliance seems to ask the Court to extrapolate
20 from the data a post-Project DSD percentage—in unspecified treatment units—

1 exceeding the fifteen percent limit provided in the Forest Plan. Yet the Forest
2 Service determined that each treatment unit's average DSD will remain below the
3 fifteen percent limit under either action alternative. *See* AR 14838. This Court will
4 neither speculate nor make unsupported extrapolations. It will defer to the Forest
5 Service's calculation that the average DSD in each treatment unit will remain below
6 the fifteen percent limit imposed by Standard 13-10.

7 To summarize, the Forest Service has shown the Mission Project's
8 consistency with the Forest Plan, and Alliance has not shown the Forest Service
9 acted arbitrarily and capriciously under the APA. *See* 5 U.S.C. § 706(2)(A). The
10 Forest Service conducted a thorough soil analysis and incorporated these findings
11 in its final EA. It concluded the Mission Project will have "long-term, beneficial,
12 moderate impacts on soil compaction in the identified areas," AR 14843, and the
13 Project complies with the Forest Plan's Standard 13-10. AR 14844. Again, this
14 Court's "[r]eview under the arbitrary and capricious standard is narrow," and it will
15 not substitute its "judgment for that of the agency." *See Oregon Nat. Desert*, 957
16 F.3d at 1032. It therefore finds the Forest Service's soil analysis consistent with the
17 Forest Plan under 16 U.S.C. § 1604(i).

18 **B. National Environmental Policy Act**

19 Turning to Alliance's claims under NEPA, Alliance maintains the Forest
20 Service violated NEPA by failing to prepare an EIS. ECF No. 19 at 27. It did not.

1 **1. Legal Framework**

2 “NEPA is a procedural statute that requires the federal government to
3 carefully consider the impacts of and alternatives to major environmental
4 decisions.” *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1110 (9th
5 Cir. 2018) (quoting *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051
6 (9th Cir. 2012)). NEPA “has twin aims.” *Id.* “First, it places upon [a federal]
7 agency the obligation to consider every significant aspect of the environmental
8 impact of a proposed action. Second, it ensures that the agency will inform the
9 public that it has indeed considered environmental concerns in its decisionmaking
10 process.” *Id.* (quoting *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066
11 (9th Cir. 2002)). “NEPA requires agencies to take a ‘hard look’ at the
12 environmental consequences of proposed agency actions before those actions are
13 undertaken.” *Id.* (quoting *All. for the Wild Rockies v. Pena*, 865 F.3d 1211, 1215
14 (9th Cir. 2017)).

15 Under NEPA, an action agency must prepare an EIS for “major Federal
16 actions significantly affecting the quality of the human environment.” 42 U.S.C. §
17 4332(2)(C). But an action agency must first identify whether it may categorically
18 exclude the proposed action from further analysis by determining if it will have no
19 significant effect on the human environment. 40 C.F.R. § 1501.4(b). “If the agency
20 cannot categorically exclude the proposed action, the agency shall prepare an [EA]

1 or [EIS].” *Id.* § 1501.4(b)(2).

2 An EA is “a concise public document” that serves to “[b]riefly provide
3 sufficient evidence and analysis for determining whether to prepare an [EIS] or a
4 [FONSI].” 40 C.F.R. § 1508.9(a)(1). If the agency finds no significant impact
5 associated with a proposed project, it may issue a FONSI rather than prepare an
6 EIS. 40 C.F.R. § 1508.13. The key term here is “significantly.” *Env’t Prot. Info.*
7 *Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1009 (9th Cir. 2006). “Whether a project
8 is ‘significant’ depends on the project’s ‘context’ and its ‘intensity.’” *Id.* (quoting
9 40 C.F.R. § 1508.27). “Context refers to the scope of the action, while intensity
10 refers to the severity of the impact.” *Id.* CEQ regulations outline ten intensity
11 factors. *See* 40 C.F.R. § 1508.27(b).

12 **2. Mitigation Measures**

13 Alliance claims the Forest Service improperly relied on delayed and
14 uncertain mitigation and beneficial impacts to justify its DN/FONSI. ECF No. 19
15 at 27–32. This Court disagrees.

16 “NEPA does not require a fully developed plan detailing what steps *will* be
17 taken to mitigate adverse environmental impacts.” *Robertson v. Methow Valley*
18 *Citizens Council*, 490 U.S. 332, 359 (1989). And this Court is mindful “that NEPA
19 does not *require* that [EAs] include a discussion of mitigation strategies.” *Akiak*
20 *Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1147 (9th Cir. 2000). “Although

1 NEPA regulations do require a discussion of the ‘[m]eans to mitigate adverse
2 environmental impacts,’ 40 C.F.R. § 1502.16(h), this provision governs the
3 preparation of an [EIS], not an [EA].” *Id.* (alteration added). That said, while an
4 action agency may ““consider the effect of mitigation measures in determining
5 whether preparation of an EIS is necessary,”” *All. for the Wild Rockies*, 865 F.3d at
6 1222 (quoting *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988
7 F.2d 989, 993 (9th Cir. 1993)), it “cannot rely on monitoring and mitigation alone
8 in reaching a FONSI.” *Jones v. Nat’l Marine Fisheries Serv.*, 741 F.3d 989, 999
9 (9th Cir. 2013).

10 An action agency relying on mitigation measures to reach a FONSI may
11 either (1) analyze “potential impacts of a proposed action and then develop[] a plan
12 to mitigate those adverse effects,” or (2) “incorporate[] mitigation measures
13 throughout the plan of action, so that the effects are analyzed with those measures
14 in place.” *Env’t Prot. Info. Ctr.*, 451 F.3d at 1015. When an agency chooses the
15 latter method, “it cannot be said that the EA fails to analyze the effects of the
16 mitigation measures; instead, the EA analyzes the [p]roject under the enumerated
17 constraints and concludes that any environmental impacts will not be significant.”
18 *Id.*

19 Here, the Forest Service incorporated mitigation measures throughout the
20 Project’s design and analyzed the proposed action alternatives’ environmental

1 impacts with those measures in place. *See* AR 14763–84. Indeed, it provided a
2 specific, detailed assessment of its plans to mitigate those impacts. AR 15118–51.
3 Alliance does not challenge the Forest Service’s specific mitigation measures nor
4 its analysis; instead, it maintains that the Forest Service cannot rely on these
5 mitigation measures to support its FONSI because inadequate funding might delay
6 or preclude implementation. ECF No. 19 at 30–32. But Alliance fails to show how
7 the Project, including its related mitigation measures, will “significantly affect[] the
8 quality of the human environment.” *See* 42 U.S.C. § 4332(2)(C). Though Alliance
9 argues “[t]he conclusions of the Forest Supervisor with respect to the factors in 40
10 CFR § 1508.27 (see AR-16802-16805) were incorrect and did not accurately reflect
11 the summary and analysis in the Environmental Assessment,” it neglects to address
12 these factors or show how the Project’s context and intensity creates significance
13 under 40 C.F.R. § 1508.27. Finally, as Defendants suggest, it appears Alliance
14 conflates the Project’s restoration objectives with the notion of environmental
15 impact mitigation. *Compare* ECF No. 19 at 30–32 *with* ECF No. 20 at 31–35. This
16 Court finds the Forest Service adequately analyzed the Project under the specified
17 constraints and reasonably determined that its measures will mitigate any
18 environmental impacts to the point of no significance. *See Env’t Prot. Info. Ctr.*,
19 451 F.3d at 1015.

20 Alliance cites *Wyo. Outdoor Council Powder River Basin Res. Council v.*

1 *U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1250 (D. Wyo. 2005), *Neighbors*
2 *of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998), *Nat'l*
3 *Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935–36 (9th Cir.
4 2008), the Forty Most Asked Questions Concerning CEQ's National Environmental
5 Policy Act Regulations, 46 Fed. Reg. 18,026 (1981), and *Cabinet Mountains*
6 *Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C.
7 Cir. 1982) to support its argument. This Court will briefly address each authority in
8 turn.

9 *Wyoming Outdoor Council* involved a challenge to a decision by United
10 States Army Corps of Engineers to issue a general permit under the Clean Water
11 Act. 351 F. Supp. 2d 1232. The court observed that mitigation measures “must be
12 imposed by statute or regulation or have been so integrated into the initial proposal
13 that it is impossible to define the proposal without the mitigation.” *Id.* at 1250.
14 There, “the mitigation measures [were] a mandatory condition to the use of [General
15 Permit] 98–08.” *Id.* It also observed that when an agency relies on mitigation
16 measures, it “may use those measures as a mechanism to reduce environmental
17 impacts below the level of significance that would require an EIS,” yet it must
18 support the proposed mitigation with substantial evidence in the record. *Id.* The
19 court determined that “the mitigation measures relied upon by the Corps, while
20 mandatory, [were] not supported by a single scientific study, paper, or even a

comment,” and, therefore, “the Corps was arbitrary and capricious in relying on mitigation to conclude that there would be no significant impact to wetlands.” *Id.* at 1252.

In contrast, Alliance has identified no statute or regulation requiring the Forest Service to consider mitigation measures while developing and implementing the Mission Project. Assuming the mitigation measures have been so integrated into the Project that it would be impossible to define the proposal without the mitigation, this Court finds the Forest Service supported its mitigation measures with substantial evidence in the record.

In *Cuddy Mountain*, the agency found the proposed agency action—a timber sale—would significantly affect the quality of the human environment by increasing sedimentation in three creeks. 137 F.3d at 1380. The court determined, “[h]aving so found, the Forest Service was obligated to describe what mitigating efforts it could pursue to off-set the damages that would result from the sale.” *Id.* (citing 40 C.F.R. § 1502.16(h) (an EIS “shall include discussions of . . . [m]eans to mitigate adverse environmental impacts”). As stated above, NEPA does not require EAs to discuss mitigation measures. *Akiak Native Cmty.*, 213 F.3d at 1147. The regulation addressed in *Cuddy Mountain*—40 C.F.R. § 1502.16(h)— governs the preparation of an EIS, not an EA. *Compare id. with Cuddy Mountain*, 137 F.3d at 1380. This case involves an EA and the Forest Service did not find the Mission

1 Project would cause significant environmental impacts, so Alliance’s reliance on
2 *Cuddy Mountain* is misplaced.

3 *National Wildlife Federation* similarly does not apply. *See* 524 F.3d at 935–
4 36. That case involved a different statutory regime altogether—mitigation in the
5 ESA context—and does not even mention NEPA. *See id.* This Court finds it
6 irrelevant in the context at issue here.

7 Finally, in *Cabinet Mountains Wilderness*, the court noted:

8 NEPA’s EIS requirement is governed by the rule of reason, and an EIS
9 must be prepared only when significant environmental impacts will
10 occur as a result of the proposed action. If, however, the proposal is
11 modified prior to implementation by adding specific mitigation
12 measures which completely compensate for any possible adverse
environmental impacts stemming from the original proposal, the
statutory threshold of significant environmental effects is not crossed
and an EIS is not required.

13 685 F.2d at 682 (citation omitted). The court held, “[b]ecause the mitigation
14 measures were properly taken into consideration by the agency, we have no
15 difficulty in concluding that the Forest Service’s decision that an EIS was
16 unnecessary was not arbitrary or capricious.” *Id.* at 683. This case is like *Cabinet*
17 *Mountains Wilderness* and fails to buttress Alliance’s argument. Here, the record
18 similarly shows that the Forest Service considered the Mission Project proposal,
19 identified the potential environmental impacts, weighed those impacts, and found
20 the mitigation measures would reduce any environmental impacts to the point of no

1 significance. *See id.*

2 As for Alliance’s reliance on CEQ’s Forty Questions publication, this Court
3 agrees that the Forty Questions publication is simply “an informal statement, not a
4 regulation,” and finds it unpersuasive. *See Cabinet Mountains*, 685 F.2d at 682.

5 **3. Environmental Impact on Soil**

6 Alliance next contends the final EA fails to provide a convincing statement
7 of reasons to support the DN/FONSI for soil disturbance impacts. ECF No. 19 at
8 32–35. But the Forest Service’s analysis was fully informed and well considered,
9 so this Court will defer to its decision.

10 NEPA requires an action agency to take various procedural steps but it does
11 not require an agency to reach any particular result. *Protect Our Communities*
12 *Found. v. LaCounte*, 939 F.3d 1029, 1035 (9th Cir. 2019). “If an agency decides
13 not to prepare an EIS, it must supply a ‘convincing statement of reasons’ to explain
14 why a project’s impacts are insignificant.” *Blue Mountains Biodiversity Project v.*
15 *Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (quoting *Save the Yaak Comm. v.*
16 *Block*, 840 F.2d 714, 717 (9th Cir. 1988)). “The statement of reasons is crucial to
17 determining whether the agency took a ‘hard look’ at the potential environmental
18 impact of a project.” *Id.* (quoting *Save the Yaak*, 840 F.2d at 717). This Court will
19 defer to an agency’s decision if it is “fully informed and well considered,” *Save the*
20 *Yaak*, 840 F.2d at 717, but “will disapprove of an agency’s decision if it made a clear

1 error of judgment.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007)
2 (citations and internal quotation marks omitted).

3 The Soil Report defines soil impact intensities using four categories:
4 negligible, minor, moderate, and major. AR 14423–24. As for compaction, rutting,
5 and puddling, the Forest Service found choosing the No Action Alternative “would
6 continue the *long-term, adverse, major* impacts on soil compaction in the identified
7 areas.” AR 14431 (emphasis added). By comparison, the Forest Service found
8 choosing Action Alternative 2 “will result in *adverse, short-term, minor* detrimental
9 soil compaction, rutting, and puddling from management activities.” AR 14440
10 (emphasis added). Overall, it found the Project will have “*long-term, beneficial,*
11 *moderate* impacts on soil compaction in the identified areas.” AR 14843 (emphasis
12 added).

13 Alliance argues these findings are arbitrary and capricious. ECF No. 19 at
14 33–35. Under the No Action Alternative, the average existing DSD in each
15 treatment unit equals about four to seven percent. *Id.* Under either proposed action
16 alternative, the average DSD in each treatment unit will increase to seven to ten
17 percent. *Id.* So, “[a] conclusion that soil disturbance of 4-7% is ‘major,’ while soil
18 disturbance that is 7-10% is ‘minor’ is simply not credible and clearly arbitrary and
19 capricious.” *Id.* at 34. It claims a final determination of “long-term, beneficial,
20 moderate impacts” makes no sense given the above. *Id.* (emphasis added). And it

1 further claims the findings are not credible considering that the analysis shows that
2 the adverse soil compaction impacts increase in intensity under either action
3 alternative. *Id.*

4 Despite Alliance’s claims, the Forest Service calculated the precise DSD
5 existing in each proposed treatment unit—it did not simply take an average. *See* AR
6 14428–29. It found the No Action Alternative “would continue the *long-term*,
7 *adverse, major* impacts” because the “current soil compaction in 14 units exceeds
8 R6 soil standards.”⁴ AR 14431 (emphasis added). It stresses that “[t]he No Action
9 alternative would do nothing to reduce the long-term legacy [i.e., existing]
10 compaction found in the project area.” *Id.* And it determined that “[t]he existing
11 compaction of *major* intensity from past land use is of greater concern” than either
12 proposed action alternative. AR 14440. “These units have soil compaction
13 conditions that [currently] limit water infiltration and storage in the soil profile,
14 promotes invasive plant species while reducing native vegetation from poor soil
15 conditions, and reduced nutrient cycling due to organic matter reduction from poor
16 plant growth.” *Id.*

17
18 ⁴ The term *major* in this context means: “Impacts to soil productivity are
19 visible/measurable, *rutting and compaction exceeds R6 standards*, complete or near
20 complete loss of organic matter layer, visible erosion and have measureable impacts
decades after project implementation. These types of soil impacts will not sustain a
diverse plant community, but rather a monoculture of non-native plants or no plant
growth at all.” AR 14424 (emphasis added).

1 In contrast, Action Alternative 2 “will result in *adverse, short-term, minor*
2 detrimental soil compaction” based largely on the Project’s proposed commercial
3 thinning activities. AR 14440. Still, the Forest Service notes, “if soil BMPs [best
4 management practices] are implemented new compaction would be *minor*.” *Id.*
5 (emphasis added). And “Alternative 2 will produce additional soil disturbance that
6 overlaps in time and space with the existing soil conditions.” AR 14449. Because
7 “[b]oth action alternatives (2 & 3) would allow for subsoiling activities to alleviate
8 *major* soil compaction from historic[al] land use,” these alternatives will allow “for
9 increased water infiltration, increased soil biological activity, and a better growing
10 medium for native plants.” AR 14445 (emphasis added). For these reasons, the
11 Forest Service determined that although Action Alternative 2 “will result in
12 *adverse, short-term, minor* detrimental soil compaction,” the Project will overall
13 have “*long-term, beneficial, moderate* impacts” because the “subsoiling activities
14 [will] alleviate *major* soil compaction from historic[al] land use.” AR 14440; AR
15 14445 (emphasis added). After closely reading the Soil Report, final EA, and
16 DN/FONSI, this Court finds the Forest Service provided a convincing statement of
17 reasons. This Court will thus defer to the Forest Service’s decision to implement
18 Action Alternative 2 because it is fully informed and well-considered. *See Save the*
19 *Yaak*, 840 F.2d at 717.

20 In sum, this Court concludes that the Forest Service did not act arbitrarily and

1 capriciously, abuse its discretion, or otherwise act contrary to the law when it
2 decided not to prepare an EIS. *See* 5 U.S.C. § 706(2)(A). It took the requisite “hard
3 look” at the Project’s environmental impacts and provided various mitigation
4 measures to effectively reduce those impacts to the point of no significance. *See,*
5 *e.g., Blue Mountains*, 161 F.3d at 1212. And it specifically addressed the
6 environmental impacts the Project will have on soils and found it will have “long-
7 term, beneficial, moderate impacts on soil compaction in the identified areas.” AR
8 14843. This Court will not intrude upon “the administrative process” by substituting
9 its judgment for that of the Forest Service. *See Friends of Endangered Species, Inc.*
10 *v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985).

11 **C. Endangered Species Act**

12 Lastly, Alliance argues that the Forest Plan and the Mission Project violate
13 the ESA. ECF No. 19 at 35–49. It claims that the Forest Service must reinitiate
14 consultation on the Forest Plan because of possible grizzly bears in the Project area.
15 *Id.* at 39. It also claims the Forest Service acted arbitrarily and capriciously by
16 allegedly failing to disclose and analyze how road density affects possible grizzly
17 bears in the Project area.⁵ *Id.* at 45. Defendants cross-move for summary judgment,

18
19
20 ⁵ In its First Amended Complaint, Alliance alleges Defendants violated the ESA
with regard to Columbia river bull trout. ECF No. 8. Yet its opening motion for
summary judgment failed to address that allegation. ECF No. 19. This Court finds

1 arguing (1) Alliance lacks standing, (2) Defendants need not reinitiate consultation,
2 (3) no grizzly bears inhabit the Project area, and (4) they adequately considered and
3 analyzed the Mission Project’s road-related impacts on grizzly bears. ECF No. 42–
4 58.

5 **1. Legal Framework**

6 Under Section 7(a)(2) of the ESA,

7 [e]ach Federal agency shall, in consultation with and with the
8 assistance of the Secretary [of Commerce or the Interior] insure that
9 any action authorized, funded, or carried out by such agency . . . is not
10 likely to jeopardize the continued existence of any endangered species
11 or threatened species or result in the destruction or adverse
12 modification of [the critical] habitat of such species.

13 16 U.S.C. § 1536(a)(2). If listed species or designated critical habitat “may be
14 present in the area,” the action agency must “conduct a biological assessment for
15 the purpose of identifying any endangered species or threatened species” that may
16 be affected by the proposed action. *Id.* § 1536(a)(2). “A biological assessment shall
17 evaluate the potential effects of the action on listed and proposed species and
18 designated and proposed critical habitat and determine whether any such species or
19 habitat are likely to be adversely affected by the action and is used in determining
20 whether formal consultation or a conference is necessary.” 50 C.F.R. § 402.12(a).

Alliance has waived this argument. *See, e.g., Friends of Yosemite Valley*, 520 F.3d at 1033 (“Arguments not raised by a party in its opening brief are deemed waived.”).

1 “The contents of a biological assessment are at the discretion of the Federal agency
2 and will depend on the nature of the Federal action.” *Id.* § 402.12(f). “If
3 the biological assessment indicates that there are no listed species or critical
4 habitat present that are likely to be adversely affected by the action and the Director
5 concurs . . . , then formal consultation is not required.” *Id.* § 402.12(k)(1).

6 ESA regulations require an action agency to reinitiate consultation only when
7 “discretionary Federal involvement or control over the action has been retained or
8 is authorized by law.” 50 C.F.R. § 402.16(a). A party seeking reinitiation must also
9 establish at least one of four possible conditions. *Id.* § 402.16(a)(1)-(4). For
10 example, “[i]f new information reveals effects of the action that may affect listed
11 species or critical habitat in a manner or to an extent not previously considered,”
12 the action agency or services must reinitiate consultation. *Id.* § 402.16(a)(2).

13 **2. Standing**

14 Defendants first challenge Alliance’s standing to raise its ESA claims. ECF
15 No. 20 at 42–46. More specifically, they claim Alliance has shown no injury in fact.
16 *See id.* In response, Alliance reiterates it has Article III standing under the ESA and
17 provides two declarations in support. ECF No. 37 at 16–18; ECF No. 37-1; ECF
18 No. 37-2. In reply, Defendants appear to concede Alliance’s second declarations
19 cured whatever standing concerns they had or at least do not reiterate their standing
20 argument and address the merits of Alliance’s claims. *See* ECF No. 38 at 8–11.

1 In any event, “Article III, § 2 of the Constitution states that the federal courts
2 may only adjudicate ‘cases’ and ‘controversies,’ and thus imposes what the
3 Supreme Court has called ‘the irreducible constitutional minimum of standing.’”
4 *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 946 (9th Cir. 2002)
5 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). “To establish
6 Article III standing, Alliance must show (1) an injury in fact, which is an injury that
7 is concrete and particularized, and actual or imminent; (2) a causal connection
8 between the injury and the conduct; and (3) a likelihood that the injury will be
9 redressed by a favorable decision.” *All. for the Wild Rockies v. U.S. Dep’t of Agric.*,
10 772 F.3d 592, 598 (9th Cir. 2014) (citing *Lujan*, 504 U.S. at 560–66).

11 “[A]n organization whose members are injured may represent those members
12 in a proceeding for judicial review.” *Sierra Club v. Morton*, 405 U.S. 727, 739
13 (1972).

14 An association has standing to bring suit on behalf of its members when
15 its members would otherwise have standing to sue in their own right,
16 the interests at stake are germane to the organization’s purpose, and
neither the claim asserted nor the relief requested requires the
participation of individual members in the lawsuit.
17 *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 181
18 (2000). Finally, Alliance must also show statutory standing. *See Salmon Spawning*
19 *& Recovery All. v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008).

20 Alliance alleges both procedural and substantive ESA injuries. ECF No. 37

1 at 16. “Plaintiffs alleging procedural injury must show only that they have a
2 procedural right that, if exercised, *could* protect their concrete interests.” *Salmon*
3 *Spawning*, 545 F.3d at 1226 (citation and internal quotation marks omitted); *see*
4 *also City of Sausalito*, 386 F.3d at 1197 (holding that plaintiffs alleging procedural
5 injury must show “(1) the [agency] violated certain procedural rules; (2) these rules
6 protect [a plaintiff’s] concrete interests; and (3) it is reasonably probable that the
7 challenged action will threaten their concrete interests.”) (citation omitted); *Nuclear*
8 *Info. & Res. Serv. v. Nuclear Regulatory Comm’n.*, 457 F.3d 941, 949 (9th Cir.
9 2006) (same). “The concrete interest test has been described as requiring a
10 geographic nexus between the individual asserting the claim and the location
11 suffering an environmental impact.” *Nuclear Info.*, 457 F.3d at 950 (citation and
12 internal quotation marks omitted).

13 Aesthetic and recreational harm satisfies the injury in fact requirement. *See*
14 *Sierra Club*, 405 U.S. at 734. Alliance established such an injury in its declarations
15 claiming that Alliance, and its members, continually visit the federal lands at issue
16 and have a scientific, recreational, aesthetic, personal, spiritual, and professional
17 interest in the forest’s health, including providing grizzly bear habitat. *See id.* at
18 735; ECF Nos. 37-1, 37-2. Though Alliance and its members have seen no grizzlies
19 in the disputed area, they hope for a grizzly bear sighting someday on these federal
20 lands. *Id.* The Ninth Circuit has repeatedly held that these types of injuries satisfy

1 the injury in fact requirement. *See generally Desert Citizens Against Pollution v.*
2 *Bisson*, 231 F.3d 1172, 1176–77 (9th Cir. 2000) (collecting cases). Alliance
3 established a sufficiently concrete interest by discussing the geographic nexus
4 between Alliance and the Mission Project. *See Nuclear Info.*, 457 F.3d at 950; ECF
5 Nos. 37-1, 37-2. If proven, Alliance’s request to reinitiate formal consultation under
6 the ESA *could* protect their concrete interests. *See Salmon Spawning*, 545 F.3d at
7 1226.

8 Because this Court determines Alliance has established standing on its
9 procedural injury, it need not address whether Alliance has also established a
10 substantive injury. Even though the parties offer no argument on the other standing
11 elements, this Court finds these elements have been met.

12 **3. Reinitiation of Formal Consultation**

13 Alliance claims new information exists that may affect grizzly bears in ways
14 not previously considered by the Forest Plan. ECF No. 19 at 40–45. But the new
15 information Alliance cites does not require the Forest Service to reinitiate formal
16 consultation.

17 FWS listed the grizzly bear as threatened in 1975, and it promulgated the
18 original grizzly recovery plan in 1982. SUPP AR 00035. “Recovery plans delineate
19 reasonable actions that are believed to be required to recover and/or protect the
20 species.” SUPP AR 00034. The original recovery plan identified “six different,

1 geographically isolated ecosystems extending from the Greater Yellowstone area,
2 to parts of Idaho and Montana, the North Cascades area of Washington, and into
3 southeast British Columbia.” *Crow Indian Tribe v. United States*, 965 F.3d 662, 672
4 (9th Cir. 2020). But despite the recovery plan, “[a]t present, only two ecosystems
5 have a substantial population of grizzlies: the Greater Yellowstone Ecosystem . . .
6 which has approximately 700 bears, and the Northern Continental Ecosystem of
7 northcentral Montana, which is estimated to have approximately 900 bears.” *Id.*

8 In 1989, the Forest Plan nevertheless recognized grizzly bears historically
9 occupied much of the OWNF. AR 00982. During the mid-nineteenth century,
10 reports documented that hundreds (if not thousands) of grizzly hides were taken in
11 the region. *See id.* While the records do not specifically confirm where the bears
12 were killed, the Forest Service accepted that some hides came from the North
13 Cascades. *Id.* Records further suggested that a small grizzly population remained in
14 the North Cascades and in the OWNF, mainly in the Pasayten Wilderness. *Id.*

15 The Forest Service initiated formal consultation with FWS in March 1986.
16 AR 00233. The Forest Plan lists several species that were thought to occur on the
17 OWNF at that time, including grizzly bears. *Id.* It also recognizes that FWS listed
18 the grizzly as a threatened species, which had been reported to occur on or near the
19 area. AR 00884. Still, it observed there had been no confirmed sightings at that
20 time. *Id.*

1 FWS recommended that the Forest Service develop criteria for inventorying
2 grizzly bears and other potentially threatened or endangered species. AR 00233.
3 The Forest Service began participating in a cooperative interagency project to
4 determine grizzly bears' status in the North Cascades and evaluate the habitat
5 capability to support grizzly bears. *Id.*; *see also* AR 00334; AR 00884; AR 00962.
6 In the Biological Assessment appended to the Forest Plan, the Forest Service
7 observed that the interagency project studying possible grizzly bear in the area was
8 underway:

9 When the project to assess the population status and the habitat
10 capability of the area is complete, the Interagency Grizzly Bear
11 Committee will recommend either the area has the potential to support
12 a viable population and will be established as a recovery area, that the
13 potential of the area to support a grizzly bear population is low and the
14 area will not be managed to recover the bear population, or the area is
15 capable of supporting a viable population, but will still not be managed
16 to recover the grizzly bear.

17 Because the population status of the grizzly bear on the Forest
18 has yet to be determined, assessment of the impacts of resource projects
19 on bears is difficult. All projects proposed will include a biological
20 assessment of the impacts on bears and be coordinated with the U.S.
Fish and Wildlife Service.

AR 00984. Even so, the Forest Plan documented "all habitat components known to
support grizzly bear populations in other areas are present on the forest." AR 00982.

In 1993, about four years after the Forest Service issued the Forest Plan, FWS
approved a revised Grizzly Bear Recovery Plan. SUPP AR 00033. "[H]abitat
research confirm[ed] that the North Cascades evaluation area offers sufficient

1 amounts of quality habitat to warrant grizzly bear recovery in the area.” SUPP AR
2 00056; *see also* SUPP AR 00209. In a 1997 supplement to the Grizzly Bear
3 Recovery Plan, FWS found that North Cascades recovery zone would likely support
4 a population of “between 200-400 grizzly bears,” yet noted this estimate might
5 change as more research is completed “on population dynamics.” SUPP AR 00210.

6 Since 1990, FWS has “received and reviewed five petitions requesting a
7 change in status for the North Cascades grizzly bear population (55 FR 32103,
8 August 7, 1990; 56 FR 33892, July 24, 1991; 57 FR 14372, April 20, 1992; 58 FR
9 43856, August 18, 1993; 63 FR 30453, June 4, 1998).” 79 Fed. Reg. 72450, 72487
10 (Dec. 5, 2014). In response, FWS determined that grizzly bears in the North
11 Cascade ecosystem warrant a change to endangered status, and, as recently as 2014,
12 continued “to find that reclassifying this population as endangered is warranted but
13 precluded [due to funding issues and higher priority listings].” *Id.* at 72487–89.

14 In January 2017, FWS and the National Park Service (“NPS”) issued a Draft
15 Grizzly Bear Restoration Plan and EIS for the North Cascades Ecosystem (“NCE”).
16 ECF No 19-2 at 24. That document highlights: “Only four confirmed grizzly bear
17 sightings have been documented within the NCE during the past decade; three of
18 these observations were of the same bear, and one observation was of a second bear
19 (IGBC NCE Subcommittee 2016). All of these sightings have been in British
20 Columbia.” *Id.* at 52. FWS and NPS have since discontinued the proposal to

1 develop and implement a Grizzly Bear Restoration Plan for the NCE, thus
2 terminating the EIS for a Grizzly Bear Restoration Plan. *See* ECF No. 19-2 at 346.

3 Alliance claims that all these post-Forest Plan findings, actions, and
4 proposals by FWS (and others) require reinitiation of formal consultation because
5 it constitutes “new information . . . not previously considered” under 50 C.F.R. §
6 402.16(a)(2). ECF No. 19 at 35–45. It also claims the effects roads have on grizzly
7 bears constitutes “new information.” *See id.*

8 New information does not always require reinitiation of consultation. *See*
9 *Conservation Cong. v. Finley*, 774 F.3d 611, 619 (9th Cir. 2014) (quoting *Sierra*
10 *Club v. Marsh*, 816 F.2d 1376, 1388 (9th Cir. 1987) (“Every modification of or
11 uncertainty in a complex and lengthy project [does not] require[] the action agency
12 to stop and reinitiate consultation.”)). *Finley* makes clear new studies require an
13 action agency to reinitiate formal consultation only when the original consultation
14 neglected to previously consider the effects that the new study reveals the proposed
15 action will create for listed species or their critical habitat. 774 F.3d at 619–20, n.3
16 (affirming denial of a reinitiation claim based on the publication of a recovery plan
17 containing “new” studies drawn from old information).

18 Alliance has identified no “new information” revealing that the Mission
19 Project will create effects that may affect grizzly bears or their critical habitat in
20 ways that the Forest Service has not previously considered. *See* 50 C.F.R. §

1 402.16(a)(2). In 1989, when the Forest Service issued the Forest Plan, grizzly bears
2 were listed as threatened—they still are. Grizzlies were also thought to inhabit the
3 OWNF—they still are. But no grizzlies have been seen in the OWNF, just like in
4 1989. And the closest sighting occurred several years ago in British Columbia, well
5 north of the Mission Project. The Forest Plan recognized that the OWNF has all
6 habitat components known to support grizzly bears, which later studies confirmed.
7 Indeed, the Forest Plan documented that hundreds of grizzlies historically occupied
8 the region. Just because a new study found that the OWNF has the carrying capacity
9 to support a hypothetical population of between 200 and 400 grizzly bears, that
10 study does not reveal any actual “effects of the [Mission Project] that may affect
11 [grizzly bears] or [their] critical habitat in a manner or to an extent not previously
12 considered.” *See* 50 C.F.R. § 402.16(a)(2). No documented grizzly bear population
13 exists in the OWNF, so any possible environmental effects stemming from the
14 Mission Project cannot possibly affect a non-existent population of bears.

15 Alliance relies on *Cottonwood*, 789 F.3d 1075 and *Hoopa Valley Tribe v.*
16 *Nat’l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106 (N.D. Cal. 2017), but both cases
17 are distinguishable. *Cottonwood* determined that an agency had to reinitiate formal
18 consultation because FWS’s new critical habitat designation for the Canada lynx
19 satisfied the “new information” trigger. 789 F.3d at 1087–88. But here, no area
20 within the Mission Project has been designated as critical habitat for the grizzly

1 bear. And in *Hoopa Valley Tribe*, it was undisputed that the action agencies had to
2 reinitiate formal consultation after a parasite, known to infect salmon, was found at
3 rates exceeding the maximum percentage permitted by the controlling incidental
4 take statement. 230 F. Supp. 3d at 1130. But here, Alliance has cited no incidental
5 take statement, much less one that the Mission Project might exceed for grizzlies.

6 As for roads, the environmental effects of roads on grizzlies were well-known
7 when the Forest Service issued the Forest Plan. *See, e.g.*, SUPP AR 00021–30
8 (citing B. N. McLellan and D. M. Shackleton, *Grizzly Bears and Resource-*
9 *Extraction Industries: Effects of Roads on Behaviour, Habitat Use and*
10 *Demography*, J. of Applied Ecology 451–60 (1988)). The Forest Plan considered
11 these effects in a section addressing anticipated impacts on grizzly bears,

12 Although all habitat components occur throughout the North Cascades,
13 the majority of bear use is expected to occur on the more remote areas
14 of the Forest, primarily the Pasayten Wilderness (530,000 acres), Lake
15 Chelan/Sawtooth Wilderness (96,000 acres), and the North Cascades
16 Scenic Highway Corridor (88,000 acres). These reserved areas are
17 located in the northwest and western portions of the Forest and *none of*
18 *them will be affected by timber harvest activities or major road*
19 *construction.*

20 AR 00983 (emphasis added). Despite the Forest Plan’s original finding that road
construction will unlikely affect grizzly bears in the Project area, it required “[a]ll
projects proposed will include biological assessment of the impacts on bears and
[will] be coordinated” with FWS. AR 00984. That has happened here.

1 The Biological Assessment considers the effects of roads on grizzlies, as
2 required by the Forest Plan. *See, e.g.*, AR 15293–94. “Because of the potential
3 affects that road and trails can have on grizzly bears, human access management
4 remains one of the most powerful tools for protecting and recovering grizzly bear
5 populations.” AR 15294.

6 Effects to grizzly bears were assessed by buffering roads, motorized
7 trails and high-use non-motorized trails by 500 meters, to calculate the
8 amount of core area in the two BMUs [Bear Management Units], as
9 described in Gaines et al. (2003). The area outside of the buffer is the
core area. This measure is intended to assess how much undisturbed
habitat is available to grizzly bears.

10 *Id.* The Biological Assessment also highlights that “[t]reatments include a suite of
11 restoration actions” like “decommissioning and closing roads.” AR 15240.

12 The Forest Service initiated informal consultation, and FWS determined that
13 the “[t]he likelihood of direct disturbance to grizzly bears is discountable due to
14 their rareness, wide-ranging habitat use, and the tendency of this species to avoid
15 areas with human activity.” AR 15610. In addition, the “potential for temporary
16 displacement and minor habitat alteration in the Project area is likely to be
17 insignificant to the survival, reproduction or distribution of the grizzly bear.” AR
18 15610. FWS thus concurred with the Forest Service’s determination that Project
19 “may affect” but is “not likely to adversely affect” grizzly bears. AR 15613.

20 In short, Alliance has shown no “new information” revealing effects of the

1 Mission Project that may affect grizzly bears or their critical habitat in a way that
2 the Forest Service did not previously consider. Thus, Forest Service did not act
3 arbitrarily and capriciously when it determined not to reinstitute formal consultation.

4 **4. Challenge to Biological Assessment**

5 Alliance finally argues the Biological Assessment (“BA”) failed to analyze
6 and disclose the Mission Project’s impact on road density, which it asserts is an
7 important aspect of the grizzly bear problem and recognized as the best available
8 science. ECF No. 19 at 46–47. Defendants counter the BA is nonjusticiable under
9 the APA but, if this Court reaches Alliance’s argument, it fails on the merits. The
10 Court finds Alliance’s argument justiciable but agrees with Defendants that it fails
11 on the merits.

12 Under the APA, “two conditions must be satisfied for agency action to be
13 ‘final’: First, the action must mark the consummation of the agency’s
14 decisionmaking process . . . [a]nd second, the action must be one by which rights
15 or obligations have been determined, or from which legal consequences will flow.”
16 *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quotations and citations omitted).
17 “BAs do not generally constitute final agency actions within the meaning of the
18 APA.” *Oregon Wild v. U.S. Forest Serv.*, 193 F. Supp. 3d 1156, 1164 (D. Or. 2016).
19 But when a final agency action, like a letter of concurrence, relies on a BA to
20 conclude no further consultation is necessary, a court may review the BA. *Id.* Here,

1 FWS based its concurrence on “information [the Forest Service] provided in [its]
2 BA” and the “Project being implemented as described in the BA and [FWS’s]
3 current understanding of the species’ use of the Project area.” AR 15613. This Court
4 finds the BA justiciable because FWS’s letter of concurrence relies primarily on the
5 BA in reaching its final determination that the Project “may affect” but is “not likely
6 to adversely affect” grizzly bear and that, as a result, it need not reinitiate formal
7 consultation. *See Oregon Wild*, 193 F. Supp. 3d at 1164.

8 As for the merits, federal agencies must “use the best scientific and
9 commercial data available” when determining whether a proposed action will
10 “jeopardize” endangered or threatened species or their critical habitat. 16 U.S.C. §
11 1536(1)(2). This requirement “ensure[s] that the ESA not be implemented
12 haphazardly, on the basis of speculation or surmise.” *Bennett*, 520 U.S. at 176.
13 “Under this standard, the agency must not ‘disregard available scientific evidence
14 that is in some way better than the evidence it relies on.’” *Nat’l Family Farm Coal.*
15 *v. U.S. Env’t Prot. Agency*, 966 F.3d 893, 925 (9th Cir. 2020) (quoting *San Luis &*
16 *Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014)). Courts
17 will not “second guess the agency’s decisions using our own judgment.” *Nat’l*
18 *Family Farm*, 966 F.3d at 925. “Because what constitutes the best scientific and
19 commercial data available is itself a scientific determination, it belongs to the
20 agency’s special expertise and warrants substantial deference” *Id.* (citations and

1 internal quotation marks omitted).

2 This Court will not second guess FWS's and the Forest Service's
3 determination here. Granted, an Interagency Grizzly Bear Committee Taskforce
4 Report concluded "open road density, total motorized access route density along
5 with the presence of core areas, are important elements in the management of human
6 access within grizzly bear recovery zones." ECF No. 19-1 at 12. But just because
7 the Forest Service declined to analyze "open road density," it did not disregard
8 "available scientific evidence that is in some way better than the evidence" it relied
9 on. *See Nat'l Family Farm*, 966 F.3d at 925. Instead, it performed a "core area"
10 analysis, which, as described above, analyzed effects to grizzly bears by buffering
11 roads, among other things. AR 15294. It determined: "Road closures and
12 decommissioning would occur and would increase core area for bears. There would
13 be no net loss of core in the [BMUs]. Temporary roads are not in core area." *Id.*

14 The Forest Service did not disregard better scientific evidence that was
15 "readily available" when it opted to perform a "core area" analysis. *See San Luis &*
16 *Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (When
17 "the information is not readily available, we cannot insist on perfection: [T]he best
18 scientific . . . data available, does not mean the best scientific data possible.")
19 (citation and internal quotation marks omitted). Alliance has identified no road
20 density analysis related to the Mission Project that the Forest Service ignored,

1 rejected or disregarded. Indeed, it appears no road density analysis for the Mission
2 Project currently exists, and the Forest Service would be required to generate new
3 data and reports. *See Nat'l Family Farm*, 966 F.3d at 926. This Court bases its
4 decision on “the fact that the best-scientific-data-available requirement ‘does not
5 require the agency to conduct new tests or make decisions on data that does not yet
6 exist.’” *See id.* (quoting *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*,
7 807 F.3d 1031, 1047 (9th Cir. 2015)).

8 This Court finds a rational connection between the facts found and the
9 conclusions made regarding the road-related effects on grizzly bears. As a result,
10 the Forest Service—in consultation with FWS—did not act arbitrarily and
11 capriciously when it determined the Project “may affect” but is “not likely to
12 adversely affect” grizzly bears.

13 CONCLUSION

14 In conclusion, this Court grants Defendants’ cross-motion for summary
15 judgment and to denies Alliance’s motion for summary judgment.

16 Accordingly, **IT IS HEREBY ORDERED:**

- 17 **1. Defendants’ Motion Cross-Motion for Summary Judgment, ECF No.**
18 **20, is GRANTED.**
- 19 **2. Plaintiff’s Motion for Summary Judgment, ECF No. 19, is DENIED.**
- 20 **3. All claims are DISMISSED WITH PREJUDICE, with all parties to**

1 bear their own costs and attorney fees.


2 **4.** All pending motions are **DENIED AS MOOT**.

3 **5.** All hearings and other deadlines are **STRICKEN**.

4 **6.** The Clerk's Office is directed to **ENTER JUDGMENT** in
5 Defendants' favor and **CLOSE** this file.

6 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
7 provide copies to all counsel.

8 **DATED** this 1st day of December 2020.

9 
10 SALVADOR MENDOZA, JR.
11 United States District Judge
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